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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 300

THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, GUY A. THOMPSON, TRUSTEE, ET AL., *Petitioners,*

v.

BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, ET AL., *Respondents*

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

The Opinions Below

The opinion of the District Court does not appear to have been reported. The opinions delivered in the Circuit Court of Appeals are reported in BROWNSVILLE NAV. DIST., ET AL., v. ST. LOUIS B. & M. RY. CO., ET AL., 91 Fed. (2d) 502.

Grounds of Jurisdiction

Petitioners submit that this Court has jurisdiction of this cause on the following grounds:

1. Section 240 of the JUDICIAL CODE, as amended by the Act of February 13, 1925 (43 Stat. 936), reads in part:

> "Sec. 240 (a) In any case, civil or criminal, in a circuit court of appeals * * * it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, * * * to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it, with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

This cause having been instituted in the District Court of the United States for the Southern District of Texas (R. 2), was appealed to the Circuit Court of Appeals for the Fifth Circuit (R. 43, 45, 46); was there decided July 15, 1937 (R. 152), and thereafter, on application of petitioners, this Court allowed certiorari.

2. Respondents, a navigation district organized under the laws of Texas and two individuals engaged in business as freight brokers and forwarders and as stevedores, sued petitioners, carriers by railroad subject to the Interstate Commerce Act (49 U. S. C. A., Section 1, et seq.), seeking a writ of mandamus to compel Petitioners to move traffic between Matamoros, Mexico, and the Port of Brownsville, Texas (about seven miles from the City of Brownsville), and to furnish equipment and facilities therefor, claiming (R. 2-19) that the duty to do so exists under the Interstate Commerce Act (49 U. S. C. A., Sec. 1 (4), 1 (11), 6).

Petitioners contended that the matters involved fell within the primary and exclusive jurisdiction of the Interstate Commerce Commission (R. 25, 32). The District Court, after hearing evidence (R. 46-139), sustained their contention (R. 39), and dismissed the petition (R. 42). With CIRCUIT JUDGE HUTCHESON dissenting (R. 148), the Circuit Court

of Appeals held (R. 141) that the District Court had jurisdiction to grant the writ of mandamus, reversed the judgment of the District Court and remanded the cause for trial (R. 152).

In view of the foregoing, it seems to us that this Court clearly has jurisdiction, and that the judgment of the Circuit Court of Appeals is properly here, subject to revision by this Court.

Statement of the Case

As shown by the map (R. 70-a), the respondent District owns the only tracks serving the turning basin and wharves of the Port of Brownsville. These tracks connect with those of petitioner, Port Isabel & Rio Grande Valley Railway Company, hereinafter called the Port Isabel. The tracks of the latter connect, in the City of Brownsville, with those of petitioner, Trustee. The Trustee's tracks connect with those of Brownsville & Matamoros Bridge Company, hereinafter called the Bridge Company, whose stock is owned in equal shares by the Trustee and the Mexican National Lines (R. 84). Finally, the Bridge Company's tracks connect, on the Mexican side of the Rio Grande, with those of the Mexican National Lines. The tracks owned by the District are switched by the Port Isabel (R. 99). Therefore, any shipment moving by rail between the Port of Brownsville and Matamoros or any other point in Mexico reached through Matamoros, must move 7.4 miles over rails operated by the Port Isabel; 2.49 miles over the Trustee's rails; 1.24 miles over the Bridge Company's rails. and also over the rails of the Mexican National Lines (R. 70). The learned trial judge well described the situation (R. 39). With respect to all such shipments, petitioner Trustee must always be an *intermediate* carrier, and can never be either the initial or delivering carrier, because his rails do not reach either Matamoros or the Port of Brownsville.

In the situation thus described, respondents sought a writ

of mandamus to compel petitioners to move traffic between Matamoros and the Port of Brownsville, and to furnish equipment and facilities therefor (R. 19), claiming that a duty to do so exists under the Interstate Commerce Act (49 U. S. C. A., Sec. 1 (4), 1 (11), 6).

Respondents, among other things alleged:

> "Said Respondent, Missouri Pacific (the Trustee), operates within Brownsville a depot and terminal facilities for the handling of the local traffic, for switching and other terminal services." (R. 6).
>
> "In order to move the traffic from the turning basin at the Port of Brownsville to uptown Brownsville and to a connection with the railways of Mexico serving Matamoros, it is necessary to use the joint service of both respondents" (R. 7).
>
> " * * * respondent Missouri Pacific lines has refused and declined to furnish equipment to respondent Port Isabel Railway for the purpose of moving the traffic that is now available for transportation from the Port of Brownsville to Matamoros * * * (R. 9).
>
> " * * * particularly is respondent, Missouri Pacific lines handling traffic under tariffs and charges similar to that herein described at Laredo, Texas, for the interchange and switching of traffic between Laredo in the State of Texas, and Nuevo Laredo * * * Tamaulipas, Mexico" (R. 10).
>
> "Heretofore at all times in the past and at the present time, respondent Missouri Pacific lines has furnished equipment, box cars, flat cars and gondola cars for the interchange of traffic coming from old Mexico into the United States through the various gateways, including Brownsville, Texas" (R. 10).
>
> "Respondent Missouri Pacific Lines, has heretofore at all times in the past and is now at the present time, furnishing its equipment for the transportation of all commodities from the ports of Corpus Christi and Houston, Texas, to various gateways including Laredo and Browns-

ville, Texas, for interchange with the national railways of Mexico, for transportation into old Mexico * * * " (R. 10).

" * * * subsequent to May 16, 1936, and after the opening of the Port of Brownsville, respondent Missouri Pacific lines refused and declined and is now refusing and declining to furnish the necessary equipment for the movement of the traffic through Brownsville * * * " (R. 12).

" * * * said respon nt Missouri Pacific lines has acted with a deliberate design for the purpose of diverting the tonnage from the Port of Brownsville to other gateways * * * (R. 14).

" * * * respondents are denying to the Port of Brownsville and the petitioners herein equal opportunity to move their traffic under interstate rates and charges lawfully on file with the Interstate Commerce Commission for the express purpose and design of diverting the traffic from the Port of Brownsville to other ports and other gateways. It is further specifically alleged that respondent Missouri Pacific lines is furnishing the equipment and permitting the traffic to move through other gateways and other ports * * * " (R. 17).

" * * * respondent Missouri Pacific lines will furnish the necessary equipment and facilities for the movement of the identical traffic here involved via Corpus Christi and Laredo to Mexico and from Mexico via Laredo to Corpus Christi, and at the same time said respondent is refusing and declining and has refused and declined to furnish equipment and facilities for the transportation of the same identical commodities through Brownsville and Matamoros to and from the same origins and destinations in the nation of old Mexico" (R. 19).

" * * * the acts of respondents herein described are preventing them (appellants) from having interstate traffic moved by common carriers * * * at the same rates and charges and under the same terms and conditions under which respondents are transporting the identical traffic for other shippers and other gateways" (R. 19).

The respondents did *not* allege that the Trustee had re-

fused to *transport* their traffic; but merely that he had refused to *furnish equipment* (R. 12). They alleged that the Port Isabel had refused to furnish equipment for the transportation of this international traffic because it does not own a sufficient supply (R. 7). Its equipment, according to the proof, is limited to one caboose and one water car, and it "owns no serviceable freight equipment whatever" (R. 100). The Mexican National Lines will not allow their equipment to leave the Republic of Mexico (R. 75).

The American tariffs applicable to movements over the route above described, between Matamoros and the Port of Brownsville, published by the Port Isabel, the Trustee and the Bridge Company, respectively, are *several but not joint* (R. 87, 90, 97), although the Trustee was a party to the Bridge Company's tariff prior to May 4, 1936. Consequently, to determine the aggregate charges for the movement of a carload of freight between Matamoros or other Mexican points and the Port of Brownsville, there must be added together the separately established charges of the Mexican National Lines, the Bridge Company, the Trustee and the Port Isabel (R. 83).

Thus, the case is not concerned with the construction of a tariff or of any provision of a tariff. Respondents contend that petitioners have failed and refused to furnish cars as demanded; that the Interstate Commerce Act imposes upon them the duty to furnish such cars as demanded, and that such refusal is unreasonable and discriminatory. The tariffs of petitioners under which the traffic must move, if at all, are *switching tariffs only* (R. 87, 90), and contain no rules, regulations or promises respecting the furnishing of cars.

On movements from the Port of Brownsville, the initial carrier must be the Port Isabel and none other, for it is the only railroad serving the port. But it has no serviceable freight equipment (R. 100). It now has pending before the Interstate Commerce Commission and the Reconstruction Finance Corporation, applications for a loan to enable it to buy some

freight equipment, but the respondents "have objected and are yet objecting to all of the proposed loan" (R. 100).

In the opposite direction, on traffic originating in Mexico, destined to the Port of Brownsville, the initial carrier must be the Mexican National Lines, but it refuses to permit its equipment to leave the Republic of Mexico (R. 75).

The majority in the Circuit Court of Appeals erroneously stated that respondents Lallier and Philen, "tendered freight to the appellees, who failed to transport it" (R. 144). As stated above, it is impossible to tender freight to the Trustee, at either Matamoros or the Port of Brownsville, or to the Port Isabel at Matamoros. The majority also fell into error in saying, "There is no request or necessity for an order requiring the Missouri Pacific (the Trustee) to send its equipment to foreign soil" (R. 147). Obviously, cars cannot be sent to Matamoros or any other point in Mexico, for loading or unloading without their being sent "to foreign soil." The very essence of the complaint rests on the refusal to furnish cars to carry shipments to and from points in Mexico. The majority opinion also states that respondents "have requested transportation facilities to be furnished *under the regular tariffs* on file (R. 146). The record contains, in full, "the regular tariffs on file." Neither the majority in the Circuit Court of Appeals nor the respondents have pointed out any rule or statement in any of these tariffs providing that cars will be furnished for the movements here involved. There is no such provision (R. 87-98), and the tariffs published by petitioners apply only to transportation *between points in the United States.*

In essence, the case boils down to this:

A writ of mandamus, commanding the Port Isabel to furnish cars would be vain, because it owns none. The writ must first require it to procure some; but an order requiring a carrier to supply itself with cars, involving, as it does, corporate finances, the price of equipment, the type of cars

needed, the number of each kind, and other technical matters, is essentially an administrative matter for the Interstate Commerce Commission, under paragraphs (4) and (10) to (17) of Section 1 of the INTERSTATE COMMERCE ACT (49 U. S. C. A. 1).

So far as concerns the Trustee, JUDGE HUTCHESON described the case in his dissenting opinion, when he said: "What is sought is a court decree to compel a connecting carrier, having no interest in or concern with a movement except to perform a switching service, to furnish all cars which may be needed for shipment to Mexico, as to which there is no joint through rate, which do not originate on its lines, and in regard to which it gets no line haul" (R. 152). He might have added that respondents also seek to have this intermediate carrier furnish all the cars required for movements in the reverse direction, originating in Mexico.

The proof details many of the complex factors entering into the task of supplying various types of cars needed for transportation; the problems constantly arising for solution and the necessity of making frequent changes in plans on short notice (R. 71-80). The problem, therefore, is essentially administrative. As stated above, no rule or other provision of any tariff was offered in evidence for construction by the Court, as to meaning or application. The real complaint is that the refusal to furnish cars, as demanded, is unreasonable and unjustly discriminatory.

Specification of Errors

1. The Circuit Court of Appeals erred in reversing the judgment of the District Court.

2. The Circuit Court of Appeals erred in holding and deciding that the District Court has jurisdiction to try the cause.

3. The Circuit Court of Appeals erred in holding and de-

ciding that the Interstate Commerce Commission does not have exclusive jurisdiction over the matters complained of by respondents.

4. The Circuit Court of Appeals erred in finding that respondents Lallier and Philen tendered freight to petitioner Trustee, and that he failed to transport it.

5. The Circuit Court of Appeals erred in finding that there is no car shortage and no emergency which renders petitioners unable to comply with the order sought by respondents.

Argument

1. *If the matters of discrimination and joint through rates and routes be laid aside, as here they must be, the Interstate Commerce Act does not require carriers subject thereto to send their equipment into a foreign country.*

Section 1 of the Act (49 Stat. L. 543) reads, in part, as follows:

> "(1) That the provisions of this part (I) shall apply to common carriers engaged in—
>
> "(a) The transportation of passengers or property wholly by railroad * * *
>
> " * * * from or to any place in the United States to or from a foreign country, *but only in so far as such transportation takes place within the United States.*" (Italics ours.)

The emphasized portion of the statute is a clear limitation on all that follows, and was recognized as such in NEWS SYNDICATE CO. v. NEW YORK CENTRAL R. CO., 275 U. S. 179, and LEWIS-SIMAS-JONES CO. v. SOUTHERN PACIFIC CO., 283 U. S. 654.

In the cases cited the court held that where joint through rates were published from a point in a foreign country to a

point in the United States, and no proportional rate was published for that part of the movement occurring within the United States, the Interstate Commerce Commission had power to determine the reasonableness of the through rate, and to award reparation against the American carriers, as joint tortfeasors, to the extent the through rate was found to be unreasonable.

From these decisions it might, in a proper case, be argued by analogy, that *if there were* joint through rates in existence, between the Port of Brownsville and Matamoros or other points in Mexico, the participating carriers would be under the same legal duty to furnish equipment for the transportation to which such rates applied as they would be in respect of traffic moving on rates between points in Texas and points in other States. But that argument cannot be made here. Neither the Trustee, the Bridge Company, nor the Mexican Lines has joined or concurred in the tariff of the Port Isabel (R. 87). Likewise, the tariffs of the Trustee (R. 90) and the Bridge Company (R. 97) are several rather than joint. The Mexican tariffs, which include an additional charge for movement between Matamoros and the point of interchange with the Bridge Company, are not included in the record; but they also show separately established charges (R. 83). There being no through route or joint rate, but merely a combination of local switching rates, applying, so far as petitioners are concerned, only to transportation within the United States, we are unable to perceive how the above quoted limitation, contained in paragraph (1) of Section 1 of the Act, can be avoided, even by analogy to the cases cited.

If a discrimination should exist, as alleged in the petition for mandamus (R. 10-19), by reason of the furnishing of such equipment at one gateway and not at another, it might well be within the power of the *Interstate Commerce Commission* to find that the discrimination is unjust, and order it re-

moved.* GREAT NORTHERN RY. v. MERCHANTS' ELEVATOR CO., 259 U. S. 285, 291; WESTERN & A. R. R. v. GEORGIA, ETC., COMMISSION, 267 U. S. 493, 497, 498. But that would be the exercise of an *administrative* power by the Commission, which no court may exercise by mandamus. And even in such cases, the Commission would probably be limited to an order directing the removal of the discrimination, leaving to the carriers the alternative to furnish the equipment at both places, or at neither. WESTERN & A. R. R. v. GEORGIA, ETC., COMMISSION, *supra;* TEXAS & P. RY. CO. v. UNITED STATES, 289 U. S. 627, 650.

In view, therefore, of the quoted restriction which paragraph (1) of Section 1 of the Act places on its remaining provisions, petitioners submit that the alleged legal duty, which respondents would have enforced by mandamus, does not exist; and that if a remedy exist the Commission is the proper forum.

2. *The questions arising in this case being essentially administrative, resort must first be had to the Interstate Commerce Commission.*

The District Court was clearly right in holding that the complaint should go first to the Interstate Commerce Commission. This is true for two reasons:

First, the function to be exercised "is in its nature administrative, in contradistinction to judicial * * * . The inquiry is essentially one of fact and of discretion in technical matters * * * reached ordinarily upon voluminous and conflicting

*By a report and order (still unreported) in **Brownsville Nav. Dist., et al., v. The St. Louis B. & M. Ry. Co., et al.,** Docket No. 27,691, dated November 2, 1937, the Commission did in fact pass on the questions of discrimination; stated that the complaint had been filed with it March 30, 1937 (ten days after the appeal from the District Court in this case had been perfected); found that discrimination existed in only one of several respects alleged; ordered it, in that respect, removed, and reserved for future determination the charges that other sections of the Act had been violated. It expressly referred to the pendency of this case in this Court.

evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts." GREAT NORTHERN RY. CO. v. MERCHANTS' ELEVATOR COMPANY, 259 U. S. 285.

Second, the refusal to furnish cars, which may be deemed to be a rule, practice or regulation, is attacked as unreasonable and unjustly discriminatory. The determination of such a question plainly lies with the Commission. TEXAS & PACIFIC RY. CO. v. ABILENE COTTON OIL COMPANY, 204 U. S. 426. If, without previous action by the Commission, courts and juries should undertake to determine the reasonableness of petitioners' action, "it would follow that, unless all courts reached an identical conclusion, a uniform standard * * * would be impossible."

GREAT NORTHERN RY. CO. v. MERCHANTS' ELEVATOR COMPANY, *supra,* was a suit brought by the elevator company in a State court against the Great Northern Railway Company and the Director General to recover an amount said to have been exacted in violation of a published tariff. Whether the charge was payable depended upon a question of construction, that is whether the body of a tariff rule applied, or an exception to the rule. On this question the court said there was room for reasonable difference of opinion. The carrier claimed that until the true construction of the tariff had been determined by the Interstate Commerce Commission, the trial court was without jurisdiction. This Court said:

> "Whenever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative, in contradistinction to judicial. But, ordinarily, the determining factor is not the character of the function, but the character of the controverted question and the nature of the inquiry necessary for its solution. To determine what rate, rule, or practice

> shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts."

In the present case, "the inquiry is essentially one of fact and one of discretion in technical matters." The right of respondents to a supply of cars for the movement of their traffic is by no means absolute. At best, they are members of the shipping public and have no greater right to the available supply than other shippers in like circumstances. The circumstances, including the supply of each kind of cars available and the necessities of other shippers, must always be determined in the light of conditions existing at the time the demand is made. The complexity of the factors which must be taken into consideration in passing upon the reasonableness of a demand for cars was shown by the testimony of the witness Levy (*infra*, pp. 27-29).

Consideration must be given, when each demand is made, to the number and type of cars demanded; the requirements of other shippers for like cars at different points of origin; the prior right of shippers of perishables; the length of time the equipment demanded will be engaged in the service for which the demand is made; the location of the points where it will be released, and perhaps to other matters, "for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable."

This case is much like BALTIMORE & OHIO R. R. Co. v. U. S., 215 U. S. 481, in which MR. CHIEF JUSTICE WHITE, then Associate Justice, said:

> "To a consideration of this question it is essential to at once summarily and accurately fix the subject matter of the alleged grievances and the precise character of the relief, required in order to remedy the evils complained of upon the assumption of their existence. As to the first, it is patent that the grievances involved acts of the Baltimore & Ohio Railroad, regulations adopted by that company, and alleged dealings by the other corporations, all of which, it is asserted, concern interstate commerce, and all of which, it is alleged, are in direct violation of the duty imposed upon the railroad company by the provisions of the act to regulate commerce. As to the second, in view of the nature and character of the acts assailed, of the prayer for relief which we have previously excerpted, and of the relief which the court below directed to be awarded, it is equally clear that a prohibition, by way of mandamus, against the act, is sought, and an order, by way of mandamus, was invoked and was allowed, which must operate, by judicial decree, upon all the numerous parties and various interests as a rule or regulation as to the matters complained of for the conduct of interstate commerce in the future. When the situation is thus defined we see no escape from the conclusion that the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission, and not subject to be judicially enforced; at least, until that body, clothed by the statute with authority on the subject, had been afforded, by a complaint made to it, the opportunity to exert its administrative functions."

In further statement of the reasons for the decision, the Court said:

> "And the destructive effect upon the system of regulation devised by the act to regulate commerce, which

> these illustrations show must be the result of construing that act as giving authority to the courts, without the preliminary action of the Commission, to consider and pass upon the administrative questions which the statute has primarily confided to that body, may be greatly multiplied. This is shown by the opinion of the Commission in the Baltimore & Ohio case, to which we have already referred, where the decisions of other lower courts are referred to in conflict with the opinion of the court below in this case as to mine rating, and not in harmony with the views expressed by the Commission in the Baltimore & Ohio case."

The case was reversed and remanded, with instructions to dismiss the petition.

In MORRISDALE COAL CO. v. PENNSYLVANIA RAILROAD Co., 230 U. S. 304, the plaintiff in error brought suit against the railroad for damages occasioned by an unfair distribution of cars to it and an undue allotment of cars to its competitor. The Supreme Court, speaking through MR. JUSTICE LAMAR, after stating the case, said:

> "The prohibitions of § 3 of the Commerce Act require that cars shall be fairly allotted to shippers without unjust discrimination or unfair preference. But the statute does not define what is the proper method of distribution in case of car shortage, and at the time of the transactions out of which this suit arose, no general rule had been adopted by the carriers or promulgated by the Commission. * * * "

At this point, attention may be directed to the fact that here also "no general rule has been adopted by the carriers or promulgated by the Commission." Apparently the respondents seek here to have the court, by a writ of mandamus, promulgate, at least for themselves, a special rule of car distribution. Continuing, the court said further:

> "In view of the decision in the Abilene, Pitcairn, and

Robinson cases it is unnecessary again to discuss the statute, or do more than say that in this case the plaintiff was not entitled to maintain its action without producing an order of the Commission that the rule adopted by the Pennsylvania Railroad was unreasonable.

"The plaintiff, however, seeks to take the case out of the principle of those decisions, insisting that this is a suit for damages occasioned by a violation of the rule; and that, therefore, without any order of the Commission, it is entitled to institute a suit for the recovery of damages resulting from the failure to distribute cars according to the method established by the railroad itself. The record, however, does not sustain this position, for the evidence does not show any breach of the rule or any failure to deliver to the Morrisdale Company all of the cars to which it was entitled under the method of allotment in force between 1900 and 1906. On the contrary, it was admitted at the hearing that there had been no discrimination against the plaintiff in the application of the rule, the complaint being that the basis of allotment was unreasonable, and that *all cars in the district* should be distributed according to the capacity of the mine, without deducting private cars, foreign fuel cars, or the carrier's own fuel cars. Whether this should be done as a general rule, or under the peculiar conditions prevailing on defendant's road at that time, was, as we have seen, an administrative question, and to be decided by the Commission as preliminary to the right to maintain this suit. The circuit court rightly held that until this was done it had no jurisdiction as a Federal court of the cause of action sought to be enforced."

In PENNSYLVANIA RAILROAD COMPANY v. CLARK BROS. COAL MINING COMPANY, 238 U. S. 456 (opinion by CHIEF JUSTICE, then Associate Justice, HUGHES) it was said:

"This suit was brought in January, 1912, by the Clark Brothers Coal Mining Company (defendant in error) in the court of common pleas of Clearfield County, Pennsylvania, to recover damages for inadequate and un-

justly discriminatory car service and supply. The complaint related to the action of the defendant company with respect to cars required for the transportation of coal from plaintiff's mines known as Falcon, Nos. 2, 3, and 4, in Clearfield County, and Falcon, Nos. 5 and 6, in Indiana County, Pennsylvania, between October, 1905, and April 30, 1907. A statute of Pennsylvania (Act of June 4, 1883, P. L. 72, 4 Purdons 3906; see Const. (Pa.) 1873, Art. 17) prohibits undue or unreasonable discrimination by any common carrier 'in charges for or in facilities for the transportation of freight within this State or coming from or going to any other State,' and provides that the carrier guilty of unjust discrimination shall be liable 'for damages treble the amount of injury suffered.'

"On behalf of the defendant (plaintiff in error) the jurisdiction of the court to entertain the action was challenged upon the ground that, with respect to car distribution, the defendant was subject to the act to regulate commerce, and that the claim of the plaintiff was cognizable only by the Interstate Commerce Commission or by the courts of the United States. * * *

"The question whether the rule or method of car distribution practiced by the railroad company as unjustly discriminatory was one which the Commission had authority to pass upon. * * * Further, by reason of the nature of the question involved in an attack upon the rule or method of the company in distributing cars, no action was maintainable in any court to recover damages alleged to have been inflicted thereby until the Commission had made its finding as to the reasonableness of the rule."

Whether at any time, under the circumstances then existing, an intermediate switching carrier, serving neither point of origin nor point of destination, and securing no line haul on a movement, should be required to furnish *all* of the equipment for that movement, the primary benefit of which is enjoyed by a foreign railroad which refuses to permit its

equipment to enter this country for loading or unloading, seems to us to render the question essentially one of administration.

TEXAS & PACIFIC RY. CO. v. ABILENE COTTON OIL CO., *supra*, is so familiar to the Court that a restatement of the facts is unnecessary. However, the following quotation from the opinion is so directly applicable to the questions here involved that it is given for the convenience of the Court:

> "When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity, between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. This follows, because, unless the requirement of a uniform standard of rates be complied with, it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for *if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission,* finding the established rate to be unreasonable, and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief from the basis that the established rate was unreasonable, in the opinion of a court and jury, and *thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced.* This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the Commission, would give rise to a change of the schedule rate and thus cause the new rate resulting from the action of the court to be applicable in future as to all. This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recog-

nition of the right asserted. For *if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible,* as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. *Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission, and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed, no reason can be perceived for the enactment of the provision* endowing the administrative tribunal which the act created with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, *if the power was left in court to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission* in the premises. This must be, because, *if the power existed in both courts and the Commission* to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by

a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible." (Italics ours.)

In MITCHELL COAL & COKE COMPANY v. PENNSYLVANIA RAILROAD COMPANY, 230 U. S. 247, the following question was certified to the Supreme Court:

> " 'Has the circuit court of the United States, in advance of any application to the Interstate Commerce Commission and action thereon by that body, jurisdiction to entertain an action of trespass brought by a shipper of coal and coke, to recover damages because of the alleged unlawful preferential rates accorded to other and competing shippers of coal and coke, when such alleged preferential rates are claimed to have resulted from payments made to such other shippers, which payments the plaintiff claimed were rebates from the published and filed freight rate, and the defendant claimed were made as compensation for services rendered by such shippers or for other accounts which justified it in making the same, and when it further appeared that such payments had been made pursuant to a practice of long standing, and that a number of shippers other than the plaintiff were interested in the question of the lawfulness thereof.' "

The court said:

> "The necessity under the statute of having such questions settled by a single tribunal in order to secure singleness of practice and uniformity of rate has been pointed out and settled in Abilene, Pitcairn and Robinson cases, and is referred to here because this record and that in Pennsylvania R. Co. v. International Coal Min. Co., just decided (230 U. S. 184, 57 L. Ed. 1472, 33 Sup. Ct. 893) furnish a striking illustration of the results which would follow if the reasonableness of an allowance could be decided by different tribunals. Both cases involve the payment of 18 cents a ton to the Altoona Company dur-

ing the same period and for identically the same reasons. In both the plaintiff insisted that the payment was a rebate, and the carrier that it was compensation for services rendered. In the International case the judge treated the Altoona allowance as lawful and reasonable. In this case the referee found that it was a rebate, while the trial judge, in passing on exceptions to the report, held that it was a question of fact about which the evidence was conflicting, and thereupon approved the referee's report. Treating it as a question of fact, there may have been sufficient testimony to sustain the finding in both instances, although the conclusion was diametrically opposite. And, applying the rule that appellate courts will not disturb findings of fact where the evidence is conflicting, contradictory judgments might have been affirmed, and one plaintiff could have been awarded damages on the theory that the Altoona allowance was unlawful, and the other been mulcted in cost because the Altoona allowance was legal. This and like considerations compelled the holding that, as the courts have no primary jurisdiction to fix rates, neither can they do so at the suit of a single plaintiff who claims to have been damaged because an allowance paid its competitors was unreasonable in amount.

"It is argued that this conclusion ignores §§ 9 and 22, which give the shipper the option of suing in the courts or applying to the Commission. The same argument was made and answered in the Abilene case by showing that to permit suits based on the charge that a particular practice was unreasonable, without previous action by the Commission, would repeal the many provisions of the statute requiring uniformity and equality. For, manifestly, such uniformity and equality cannot be secured by separate suits before separate tribunals, involving the reasonableness of a rate or practice. The evidence might vary, and, of course, the verdicts would vary; with the result that one shipper would succeed before one jury and another fail before a different jury, where the reasonableness of the same practice was involved. Manifestly, different verdicts would occasion inequality between the two shippers, and it is equally

manifest that if the Commission had made one order of which both could avail themselves, there would have been one finding, of which one, two, or a score of shippers could equally avail themselves. The claim that this conclusion nullifies § 9 is concretely answered by the fact that the court has just decided to the contrary in Pennsylvania R. Co. v. International Coal Min. Co. There the carrier insisted that a suit for damages occasioned by rebating could not be maintained without preliminary action by the Commission. This contention was overruled, and it was held that, for doing an act prohibited by the statute, the injured party might sue the carrier without previous action by the Commission, because the courts could apply the law prohibiting a departure from the tariff to the facts of the case. But where the suit is based upon unreasonable charges or unreasonable practices, there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission, and not the courts, should pass upon that administrative question. When such order is made, it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case,—thereby giving every shipper equal rights and preserving uniformity of practice."

In LOOMIS v. LEHIGH VALLEY R. R. Co., 240 U. S. 43, the court said:

"Plaintiffs in error have long been shippers of grain and produce over the line of defendant carrier from Victor and other stations in Western New York. From time to time during a period beginning in August, 1906, and ending May 6, 1908, they requested it to furnish at such places for their use one or more cars—about two hundred altogether—suitable for transporting in bulk, wheat, oats, rye, apples, cabbages, and potatoes. In response, it sent ordinary box and refrigerator cars inadequate for the required service until fitted with inside doors or transverse bulkheads. Prior to 1906, in like circumstances, the custom was for the railroad to supply

lumber without charge and shippers constructed these temporary fittings. This practice was discontinued at the stations mentioned, and, during the period specified, it refused either to supply such material or cars completely prepared for carrying in bulk the enumerated articles. Plaintiffs were therefore compelled to construct inside doors or bulkheads in the cars which they loaded and delivered to defendant for transportation to points both within and beyond the State. The total cost of material used was $322.07,—it varied from 40 cents to $3.50 per car.

"Payment of the amount so expended was demanded by plaintiffs and refused. Without preliminary resort to the Interstate Commerce Commission, they then brought this action in a State court upon the theory that the carrier having failed to perform its common-law duty to furnish adequate cars, they were entitled to recover as damages their consequent outlay. * * *

"Speaking through Mr. Justice Lamar in Mitchell Coal & Coke Co. v. Pennsylvania R. Co., 230 U. S. *supra*, we said (p. 255):

> 'The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on the claim that unreasonable allowances have been paid. If the decision of such questions was committed to different courts with different juries the results would not only vary in degree, but might often be opposite in character—to the destruction of the uniformity in rate and practice which was the cardinal object of the statute.'

"In the Minnesota Rate Cases, 230 U. S., *supra*, we further said (p. 419):

> 'The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this court has repeatedly held, it could be destructive of the system of regulation defined by the

> statute if the court, without the preliminary action of the Commission, were to undertake to pass upon the administrative question which the statute has primarily confided to it.'

"And in Texas & P. R. Co. v. American Tie & Timber Co. 234 U. S. *supra*, the rule *was thus stated* Ap. 146):

> 'It is equally clear that the controversy as to whether the lumber tariff included cross-ties was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the statute. Indeed, we think it is indisputable that that subject is directly controlled by the authorities which establish that, for the preservation of the uniformity which it was the purpose of the act to regulate commerce to secure, the courts may not as an original question exert authority over subjects which primarily come within the jurisdiction of the Commission.'

"An adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered. In the last analysis the instant cause presents a problem which directly concerns rate-making and is peculiarly administrative. Atchison, T. & S. F. R. Co. v. United States, 232 U. S. 199, 220, 58 L. Ed. 199, 576, 34 Sup. Ct. Rep. 291. And the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court. See Pennsylvania R. Co. v. Puritan Coal Min. Co., 237 U. S. pp. 128, 129, 59 L. Ed. 871, 872, 35 Sup. Ct. Rep. 484; Pennsylvania R. Co. v. Clark Bros. Coal Min. Co., 238 U. S. pp. 469, 470, 59 L. Ed. 1412, 35 Sup. Ct. Rep. 896.

"If, in respect to interstate business, the courts of

> New York may determine, as original matters, rate-making problems, those in other States have like jurisdiction. The uncertainty and confusion which would necessarily result is manifest. Ample authority has been given the Commission, in circumstances like those here shown, to administer proper relief, and in connection therewith to approve some general rule of action. In so doing it would effectuate the great purpose for which the statute was enacted."

Respondents, although they do not expressly refer in their petition to Section 3 of the Interstate Commerce Act, plainly raise the issue of discrimination. They charge that the Trustee is handling similar traffic, and furnishing equipment therefor, between Laredo, Texas, and Nuevo Laredo, Mexico, while declining to do so between Brownsville, Texas, and Matamoros (R. 10, 12); that the Trustee is likewise furnishing equipment for transportation from the ports of Corpus Christi and Houston through various gateways, including Laredo and Brownsville (R. 10); that the Trustee has acted with a deliberate design for the purpose of diverting tonnage from the Port of Brownsville to other gateways (R. 17); that the petitioners are denying to respondents equal opportunity of moving their traffic, as compared with other ports and gateways (R. 19); and that the acts of petitioners are preventing respondents "from having interstate traffic moved by common carrier * * * at the same rates and charges and under the same terms and conditions under which respondents (petitioners here) are transporting the identical traffic for other shippers and other gateways" (R. 19).

There could hardly be a plainer charge of unjust discrimination. And it is entirely clear from the decisions of this Court that such a charge must go to the Commission rather than the courts. The tariffs which are copied in the record do not disclose the existence of any through routes and joint rates. Rather, they show nothing but separately established

switching charges. And the charges set forth in the tariffs of petitioners apply only between points in the United States (R. 70a, 87, 90).

Even where carriers join in establishing through routes and joint rates, intermediate carriers have never been required by the Commission to furnish more than a ratable or proportionate number of cars. HUERFANO COAL CO. v. COLORADO & SOUTHEASTERN R. R. CO., ET AL., 28 I. C. C. 502; LUMBER RATES THROUGH OHIO RIVER CROSSINGS, 29 I. C. C. 38; CAMPBELL'S CREEK COAL CO. v. ANN ARBOR R. CO., ET AL., 33 I. C. C. 558. But see, IN RE HANDLING OF FRESH MEAT, 132 I. C. C. 49, in which the Commission said:

> "A shipper served by a switching line ordinarily makes initial request of that line for cars, but the carrier receiving the road haul is commonly looked to eventually to furnish cars, and respondent's freight-traffic manager so testified."

What would be a ratable or reasonable number of cars under all the surrounding transportation circumstances would clearly be a question for the Commission rather than the courts. So, even if there were through routes and joint rates, the question would be be administrative rather than judicial. Much more so is this true, when, as here, there is no through route, but only a combination of *separately established switching charges.*

In the light of the nature of the controversy, the facts disclosed by the record, and the decisions of this Court, we submit that the trial court correctly dismissed the petition, for the reason that it should have been presented to the Commission rather than the courts. The power which respondents would have exerted is essentially administrative, and the question of discrimination which they raise is not one which the courts should determine.

3. *Mandamus is not a proper or appropriate remedy.*

The respondents do not seek to have petitioners compelled to furnish equipment for the transportation of specific traffic, now tendered for immediate movement under present and known conditions. They allege that there is available, for movement through the Port of Brownsville "a *minimum annual tonnage* * * * to and from Mexico," including 50,000 bales of cotton, 10,000 tons of cottonseed cake, 100,000 tons of lead bullion, 24,000 tons of zinc concentrate, and other commodities in other substantial quantities (R. 11); but the petition (R. 11-15) makes it evident that the traffic alleged to have been once definitely arranged for has already moved by some other route, and the prayer is that petitioners be required to show cause, "if any there be, why a peremptory writ of mandamus should not issue requiring said respondents" (petitioners here) "*to continue to furnish, for all times in the future*, adequate and sufficient equipment and necessary facilities for the transportation of the commodities herein described to and from and between Matamoros * * * and the Port of Brownsville" (R. 19).

Reference in the petition to "the impossibility of definitely fixing the damages" (R. 12); the availability of *minimum annual* tonnage (R. 11); the possibility that respondents "will lose future traffic" (R.12); "the handling of all future traffic" (R. 17); future losses estimated at $125,000 annually (R. 17); the traffic "which might reasonably be expected to move in the future" (R. 17), and irreparable injury (R. 18), all serve to emphasize the fact that respondents seek a writ that will bind the petitioners into the indefinite future, without regard to car shortages, the requirements of other shippers, or other future conditions.

The affidavit of T. H. Levy, the Trustee's General Superintendent of Transportation, in charge of car supply, shows that there are "different types of equipment which are essentially fitted for the movement of certain kinds of traffic," such as flat cars, gondola cars, both ordinary and hopper-

bottomed, box cars, refrigerator cars and stock cars, double and single-decked (R. 71); that the Trustee's lines "produce a large volume of commodities which are seasonal in nature, * * * oranges, grapefruit, cabbage, spinach, beets, carrots, beans, lettuce, Irish potatoes, tomatoes and a number of other crops;" that to move these, refrigerator cars must be assembled in advance in large numbers, the movement to point of origin being generally an empty haul, and the surplus being moved empty to other sections of the country after the season ends (R. 72); that "elaborate surveys and inspections" must be made in advance by competent men, to determine when shipping will begin and the number of cars probably to be required; that due to weather conditions, market prices, and other unforeseeable factors these estimates "must constantly be corrected" (R. 73).

He further shows the car supply officer "has constantly pressing upon him for solution * * * the problem of holding down, as low as possible, the mileage charges paid to private car lines and the per diem charges paid to other railroads for the use of their equipment; that the Louisiana sugar cane crop, and the cotton and grain crops are heavy and seasonal, the cane crop furnishing several special difficulties; that other commodities move with substantial regularity throughout the year; while still others, like oil field equipment, move spasmodically, as necessity arises (R. 74).

The fact that many of these commodities must move over two or more lines of railroad, adds another complication, according to Mr. Levy, making coöperation necessary (R. 75). But on the other hand, the competition between railroads serving the same territory makes it essential that each line be able to supply the requirements of shippers to prevent all the business from going to the competing line (R. 76).

Mr. Levy also said:

> "In view of many of the factors and circumstances which I have mentioned above, it is quite obvious that

the car supply officer is frequently required to change or modify his plans on very short notice; to receive his information and give his instructions by telegraph or telephone and to shape his plan of campaign not only from month to month, but from day to day and from hour to hour and from minute to minute.

"Any court or commission or board or other governmental agency which undertakes to have any part in the regulation or control of the supply of cars on the defendant railroads, or either of them, or on any other American railroad, must, if the job is to be intelligently done, take into consideration the same facts and circumstances that the individual car supply officer would take into consideration in handling such matters for his own railroad, and must also take into consideration the needs of connecting and competing lines and their patrons, and must also be in position to act promptly in meeting unforeseen conditions and difficulties, and the entire plan must be kept in more or less fluid or plastic form in order that it may be modified on an instant's notice to meet some circumstance which has suddenly arisen or of which the car supply officer has suddenly been notified. For this reason, if any part of the plan is solidified, or any particular service or a particular quantity of equipment is definitely assigned to a particular service or a particular locality, conditions may arise which will cause some hardship and possibly great loss to shippers or carriers, or both, unless that assignment can be promptly changed or released" (R. 76).

Under such conditions, we submit that the writ of mandamus is not an appropriate remedy for the ills complained of, and the authorities so hold.

No court of law, with a writ of mandamus outstanding, bound down as it is by the requirements of notice and hearing, can constantly shape and mould a campaign of car supply, where the plan must be changed to fit the exigencies of the occasion, not only from month to month, but "from minute to minute," as well.

DIAMOND MATCH CO. v. POWERS, 51 Mich. 145, 16 N. W. 314, was a case in which the Match Company sought to occupy the office of a register of deeds, to make up an abstract of title of all the lands in the county. It was there said:

> "When the case presents a single occasion, and calls for an act which is presently determined, it is entirely practicable to direct the act by *mandamus*. But where the case contemplates something continuous, yet variable in its conditions and aptitudes, the remedy by that process seems an unfit one. It is the office of *mandamus* to direct the will, and obedience is to be enforced by process for contempt. It is, therefore, necessary to point out the very thing to be done; and a command to act according to circumstances would be futile."

The court pointed out that "the register has rights and duties which must be respected; so the general public have rights as well as the claimant; and the conditions are not steadily the same. They are subject to variation. On every occasion each must act reasonably, and with proper regard for the rights and duties of the others. As the circumstances vary the conduct must vary." So in this case, "the conditions are not steadily the same." So also, "the general public have rights as well as" the respondents. But if a writ of mandamus should issue, the conduct of petitioners could not vary with the circumstances. It must always lag behind; for the terms of the writ could be changed only after notice and hearing, and could not be modified by telegraph or telephone, from minute to minute.

The Court of Appeals of New York reached a similar conclusion in PEOPLE v. INTERURBAN ST. RY. CO., 177 N. Y 296, 69 N. E. 596, where it said:

> "It does not require much argument to show that the writ of mandamus is not, in this case, an appropriate

> remedy to compel a general course of official conduct or a long series of continuous acts, as it is impossible for the court to oversee the performance of such duties."

In that case the effort was to compel a street car company to issue transfers, good on connecting lines. Compliance with the writ would have been much more simple than it would be here. The necessities of other patrons could not have come in conflict with the demands of that plaintiff, as here they probably must. Nor could there have existed there a problem comparable to that so evident here, respecting the type, size and number of cars to be furnished for the movement of future traffic. *A fortiori,* if mandamus did not fit in that case, it would be inappropriate here.

In EX PARTE BALDWIN, 291 U. S. 610, 619, a writ of mandamus was refused because another remedy, by injunction, was available. Here, if the right exist, there is a clear administrative remedy by resort to the Interstate Commerce Commission, which has power, under Section 1 of the Interstate Commerce Act (49 U. S. C. A. 1) to prescribe rules and regulations for the furnishing of equipment; and, in proper cases, to require carriers to supply themselves with equipment.

In PEOPLE v. BROOKLYN HEIGHTS R. Co., 172 N. Y. 90, 64 N. E. 788, the Court of Appeals refused a mandamus to compel the carrier to operate its trains over certain routes, according to previous schedules, saying the duty was by no means clear. Neither is it here; for the respondents have no greater rights than shippers generally, and, especially in times of car shortage, all must share alike in the available supply. Neither is the duty clear to furnish particular types of equipment for certain kinds of traffic, and immediately on demand.

No case has been found, so far as we know, in which a court has issued a writ of mandamus to compel carriers to furnish equipment for all future shipments, as demanded, without regard to circumstances.

The writ was refused in STATE v. LELAND & R. Co., 128 Miss. 312, 91 Sou. 7, where the effort was to compel a carrier without cash or credit to rebuild and operate an unprofitable line. The similarity of its situation to that of the Port Isabel is elsewhere mentioned.

In STATE v. ATLANTIC COAST LINE R. Co., 53 Fla. 689, 44 Sou. 223, mandamus was sought to compel the respondent to put and maintain a line of railroad in a safe and suitable condition for service, and in doing so to use materials and appliances of stated character, number and dimensions. The court refused to dictate such details. But a writ requiring the furnishing of equipment in this case would be nugatory unless replete with details. If properly framed it would not contain a command "to act according to circumstances." Is cottonseed cake to be exposed to the weather, or lead bullion to pilferage, in flat or gondola cars? Should scrap iron be loaded in box cars? Is no attention to be paid in the writ to the suitability of the equipment for the particular traffic to be moved? The answer seems obvious. The rigid writ of mandamus simply does not fit the case.

Especially is this true with respect to the Port Isabel, which has no equipment. To be effective, the writ must require that line to procure some. Shall it buy or lease? What types of cars must it procure? How many of each? What plans and specifications shall be drawn for each type? Where and how shall it get the necessary money or credit? It is not shown to have the cash. If not, the Commission must be consulted, under Section 20a of the Interstate Commerce Act (49 U. S. C. A. 20a) before securities may lawfully be issued. So far as mandamus is concerned, these inquiries, of course, lead into a blind alley, and again make it plain that if a remedy exist it lies with the Commission rather than the courts.

But they lead to another well-settled rule. Mandamus will not lie when the writ would be futile. MISSOURI v. MURPHY, 170 U. S. 78, 95; UNITED STATES v. LAPP, 244 Fed. 377, 380;

STATE v. COLONY TRUST CO., 215 Fed. 307; STATE v. LELAND, ETC., R. CO., *supra;* LITTLE v. DODGE CITY, ETC., CO., 53 Kan. 329, 36 Pac. 755. In the case of the Port Isabel, the writ must, under present circumstances, be vain. It now has pending applications for a loan to purchase equipment, to which the respondents are objecting (R. 100).

Suits for mandamus are ordinarily beyond the jurisdiction of the courts of the United States. COVINGTON & C. BRIDGE COMPANY v. HAGER, 203 U. S. 109; MACON, D. & S. R. CO. v. GENERAL REDUCTION CO., 44 Fed. (2d) 499, 501. But it is claimed that Sec. 10 of the Act of March 2, 1889, as amended (49 U. S. C. A. § 49), confers such jurisdiction in cases like the present. That section reads, in part, as follows:

> "The district courts of the United States shall have jurisdiction upon the relation of any person * * * alleging such violation by a common carrier of any of the provisions of Chapter 1 of this title, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier * * * ."

It will be noted that discrimination is the basis for the jurisdiction so conferred, and that no discrimination was charged against the Port Isabel, for the reason that it does not serve the other ports which were claimed to be preferred. Sec. 49, therefore, confers no jurisdiction of the suit against the Port Isabel.

As was said in MACON, D. & S. R. CO. v. GENERAL REDUCTION CO., *supra,* that section "has, in view of the general objects of the Interstate Commerce Act, been narrowed in construction so as to exclude contentions of such a nature as that they ought to be passed on by the Interstate Commerce Commission, and to include only such as involve enforcement of

previous orders and determinations of the Commission, or matters so plain as to require no action by the Commission. The questions which ought to go to the Commission are, in general, the same, whether court action is invoked under this section or under some other."

In BALTIMORE & OHIO R. Co. v. U. S., 215 U. S. 481, CHIEF JUSTICE WHITE, then Associate Justice, referring to Section 49, then known as Sec. 10 of the Act to Regulate Commerce, said:

> "As it was settled in the Abilene Case that the right to question in the courts the rates established in accordance with the act to regulate commerce without previous resort, by complaint, to the Commission, in order to determine their unreasonableness, would be destructive of the act, and therefore was not permissible, that ruling is equally applicable to the provision as to furnishing cars contained in § 10, which is here relied upon * * *. To give to §10 the broad meaning which the court below fixed to it would be to destroy or render inefficacious the remedial purposes of the amendments enacted in 1906, it must follow that such construction cannot be adopted, since to do so would compel us to hold that the wide and far-reaching remedies created by the amendments of 1906 were, in effect, destroyed by the narrower remedial processes which had been previously enacted in 1889. This conclusion being in reason impossible, it must follow that, construing the provisions of § 10 in the light of and in harmony with the amendments adopted in 1906, the remedy afforded by that section, in the cases which it embraces, must be limited either to the performance of duties which are so plain and so independent of previous administrative action of the Commission as not to require a prerequisite exertion of power by that body, or to compelling the performance of duties which plainly arise from the obligatory force which the statute attaches to orders of the Commission * * *."

We have cited above the cases in which it was held that in

matters of the kind presently involved, administrative action by the Commission is a prerequisite to any resort to the courts.

Several cases may be found in which, under Sec. 49, the writ of mandamus has been issued to compel a carrier to supply cars. An example is WEST VIRGINIA NORTHERN R. Co., ET AL., v. U. S., 134 Fed. 198. We suppose the Court will take judicial notice of the fact that coal is usually, perhaps universally, loaded in gondola cars. It seems to us that even aside from the matters which have just been mentioned, there is a very substantial distinction between a writ commanding a carrier to furnish a shipper with a specified number of coal cars per day, of a certain percentage of the carrier's supply of such cars, and a writ, such as would be here required, commanding the carrier to furnish the particular type and size of cars appropriate for the movement of various classes of traffic ranging from cotton and cottonseed to cement, coke and scrap iron (R. 11).

Under Section 28 of Chapter 192 of the Acts of the Forty-First Legislature of Texas (p. 410, 419), the respondent District has "the right, power and authority to acquire, purchase, take over, construct, maintain, operate, develop and regulate wharves, docks, warehouse, grain elevators, bunkering facilities, belt railroads, floating plants, lighterage, towing facilities, lands and all other facilities or aids incident to or necessary to the operation or development of ports or waterways within the district, and extending to the Gulf of Mexico." It thus appears that respondents have full authority to purchase and put to use such cars, locomotives and other equipment as may be necessary or desirable for the operation or development of their port. By Section 30 of the same Act; "said District may issue bonds in payment for the improvement so found to be necessary." The District thus has power to furnish its own remedy by buying its own equipment. It has not called on petitioners to build its wharves or docks, or

the tracks which immediately serve them. No more should it call upon them to furnish the cars which may be desirable for moving this Mexican traffic.

As shown by the record (R. 75), the Mexican National Lines some years ago, for reasons evidently sufficient to themselves, discontinued the practice of permitting their equipment to cross into the United States. In shipments moving between the Port of Brownsville and points in Mexico, the National Railways of Mexico are the only carriers which enjoy a substantial line haul; and, naturally, they receive the lion's share of the revenue paid for transportation of the freight. Therefore, it would appear to be reasonable for the Mexican Lines to furnish all necessary cars for switching to and from the docks at the Port of Brownsville and for transportation over their lines from points of origin and to destinations in Mexico. There is something inherently wrong with a demand that American railroads, which would enjoy no substantial revenue from the transaction, be required to furnish all the equipment for the movement of all such future traffic, while the Mexican railroads, the real beneficiaries of the business, furnish none.

Looking again at the whole case, it seems quite apparent that mandamus is not an appropriate remedy, and the District Court, therefore, properly dismissed the petition.

Conclusion

What has been said above may be summarized as follows:

The Interstate Commerce Act, by virtue of its application to foreign commerce only in so far as the transportation takes place within the United States, does not create or impose upon petitioners a duty to furnish equipment for the through movement of the foreign traffic here involved. Through routes and joint rates do not exist. If there be discrimination, the record does not show that the Commission has found it. It is true that the majority in the Circuit Court

of Appeals declared that there is no "necessity for an order requiring the Missouri Pacific to send its equipment to foreign soil" (R. 147). But the very essence of the complaint rests on a refusal to furnish cars for movements between a point in Texas and points in Mexico. Therefore, the legal duty which must exist as a predicate for the writ of mandamus does not exist in fact. The essential nature of the function to be exercised is administrative—not judicial. The question of discrimination which arises on the face of the petition for mandamus is one which the Commission alone may determine. The District Court had no jurisdiction to entertain the suit for mandamus, even under Section 49 of Title 49 U. S. Code. Finally, under the decisions, mandamus will not issue to compel a general course of official conduct, or a long series of continuous acts.

With all respect, we ask that the judgment of the Circuit Court of Appeals be reversed, and that of the District Court affirmed.

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